United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7161

United States Court Of Appeals
For The Second Circuit

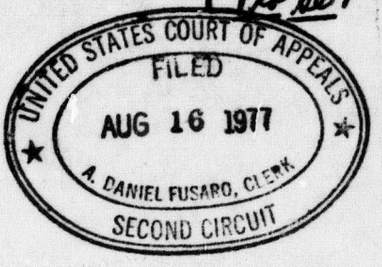
B

Robert Grant,

Docket No: 77-7161

Plaintiff-Appellee,

(Pro Se)



-V-

Board of Education Of The City of New York
and Frank C. Arricale II, Executive Director,
Division of Personnel

Defendants-Appellants,

An Appeal from an Order and Judgment of the United States
District Court for the Southern District of New York

Appellee's Brief

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United States Court of Appeals
For The Second Circuit

Robert Strait,

Plaintiff-Appellee,

Docket No: 77-7161
(Pro Se)

-v-

Board of Education Of The City of New York
And Frank C. Arricale II, Executive Director,
Division of Personnel.

Defendants-Appellants

On Appeal from an Order and Judgment of the United States
District Court for the Southern District of New York

Appellee's Brief

Facts

1. The Defendants-Appellants' Preliminary Statement of their Brief reads as follows: (p. 1) *

> "the appeal by the defendants Board of Education and Frank C. Arricale II is taken from so much of an order and final judgment of the United States District Court for the Southern District of New York. (Pierce, J.) entered March 7, 1977 which, as amended,

* Page numbers in parentheses refer to the Appellants' Appendix or Brief or the Appellee's Brief

awarded, plaintiff, formerly high school teacher employed by the Board, the sum of $ 35,698.24 plus interest as damages for violation of his constitutional rights. The District Court had earlier directed summary judgment in favor of the plaintiff on the issue of liability."

2: The Memorandum and Order, (Pierce, J. dated 3/28/77) referred to in Paragraph 1 of this Brief reads as follows: (Appendix: p. 103)

"Thus, there is no question as to the amount of back pay involved. The only issue which need be addressed is whether the New York Board of Education can be held liable for back pay in an action such as this one." (Emphasis added)

3, (Appendix: p 105) reads as follows:

"It is undisputed that a plaintiff such as Grant can obtain federal injunctive relief for violation of his constitutional rights."

"Accordingly, there being no dispute as to the amount of back pay damages due to the plaintiff, the Court hereby grants to plaintiff summary judgment on the issue of damages and finds the defendants jointly and severally liable for $ 35,698.24 plus interest at six per cent from October 1, 1976. Plaintiff shall also recover his costs."

4. (Appendix : pp 107-108) reads as follows :

" Page 4, l. 13-18 Delete entire paragraph and substitute the following in its stead :

" In its previous decision the Court dismissed the complaint as against defendant Anker but found defendant Arricale liable on Plaintiff's § 1983 claim. Defendant Arricale is not immune from suit under § 1983. Defendants do not seek to argue that finding nor do they put forth any reason why Arricale should not be held to respond in damages'. "

" A copy of this order should be filed attached to the Memorandum and Order dated February 28, 1977. "

5. The District Court's Opinion and Order (Pierce, J., August 11, 1976) (Appendix : pp 88-89) reads as follows :

" Grant was denied the benefit of these procedures and as a consequence was denied due process of law in the way in which he was placed on medical leave. In this Court's view, the submissions of the defendants themselves leave no question of fact with respect to this matter. Accordingly, the plaintiff is entitled to summary judgment with respect to his claim that he was wrongfully and improperly placed on medical leave without due process of law.

6. The same Opinion and Order cited in the aforementioned Paragraph 5 (Appendix: p. 92) reads as follows:

> " The Clerk of the Court is directed to prepare a partial judgment in accordance with this opinion and submit it to the Court for approval. "

7. The aforementioned Partial Judgment Dated August 31, 1976 referred to in Paragraph 6 of this Brief reads as follows: (Appendix: p. 97)

> " Ordered: That the Plaintiff Robert Grant be reinstated to the position he held at the time said determination was made; and that the plaintiff be given credit toward retirement for the time he has lost as a result of his having been placed on health leave.

8. Order of Pierce, J. Dated 1/31/77 (Appendix: p 101) indicates that the plaintiff was reinstated October 1, 1976.

9. The Order Correcting Partial Judgment of Pierce, J., March 1, 1977 (Appendix: pp 98-99) reads as follows:

> "Ordered that the Court reserves decision on plaintiff's claims against the defendant Board of Education brought pursuant to 28 U.S.C. § 1331; and it is further Ordered that a copy of the Corrected Partial Judgment be filed attached to the Order of Partial Judgment dated August 31, 1976."

10. The Defendants-Appellants' Appeal taken from so much of an order and final judgment (Appellants' Brief: p. 1) is from the District Court's Order and Amended Final Judgment (# 77,372 of March 11, 1977, Pierce, J.) (Appendix: p. 111) as well as the Memorandum and Order (Pierce, J. 2/28/77) (Appendix: p. 103)

> "Ordered, Adjudged and Decreed that plaintiff Robert Grant have judgment against Defendant Frank C. Arricale, II, pursuant to the Plaintiff's claim under 42 U.S.C. § 1983, and against Board Of Education of The City of New York pursuant to plaintiff's claim under 28 U.S.C. § 1331, for damages in the amount of $35,698.24 plus interest at six per cent from October 1, 1976;"

" Ordered, Adjudged and Decreed that defendant Irving Baker have judgment against the plaintiff dismissing the complaint in all its respects as against Irving Baker only and it is further

ordered, adjudged and Decreed, that plaintiff Robert Grant shall recover his costs, to be taxed by the clerk."

Questions Presented

The Appellee's Brief is concerned with 4 (four) points.

1. Is the Defendants-Appellants' Appeal "taken from so much of an order and final judgment" of the District Court entered February 28, 1977 and Amended Final Judgment of March 11, 1977? (Appellants' Brief: Preliminary Statement, pp 1-2)

2. Should the Plaintiff-Appellee argue Defendants-Appellants Point III? (Appellants' Brief: pp 25-38)

> "Assuming, Arguendo, that Plaintiff showed a violation of a federally protected right, the complaint should nevertheless be dismissed as against the Defendant Board of Education."

3. Is the Defendants-Appellants Point IV arguable? (Appellants' Brief: pp 39-40)

> "It was an error for the District Court to grant summary judgment finding the defendant Arricelli personally liable for an award of money damages."

4. Should the Defendants-Appellants be awarded costs?

Answers

Point I

1. Paragraph 2, Facts, of the Plaintiff-Appellee's Brief cites the District Court's Memorandum and Order of 2/28/77 that "The only issue which need be addressed is whether the New York Board of Education can be held liable in damages for back pay in an action such as this one." (emphasis added)

2. Defendants-Appellants' Points I and II, (Appellants' Brief: pp. 15-17 and pp. 18-24) a total of 10 (ten) pages, approximately 25% of the length of the Appellants' Brief are not in compliance with the aforementioned Memorandum and Order of the District Court that only the issue of the Board's liability need be addressed. Point I reargues Due Process and Point II concerns itself with compensatory damages. The Order and Amended Final Judgment of March 11, 1977 from which the appeal is taken is for back pay damages. (Appellants' Appendix: pp 110-111)

Point II

Defendants-Appellants' Point III, concerning the liability of the Defendant-Appellant Board cites at length. Because of ill health, (as Plaintiff-Appellee, Pro Se) I'm unable to do the research nor am I able to write a reply Brief concerning the appellants' Point III - the Defendant-Appellant Board's liability for back pay.

Point III

Defendants-Appellants' Point IV, (Appellants' Brief: pp 39-40) indicates as follows:

> " It was error for the District Court to grant summary judgment finding the defendant Arricale personally liable for an award of money damages. "

1. Defendants-Appellants' appeal, Point IV, has not been "taken from so much of an order and final judgment" of the District Court which with the District Court's Memorandum and Order (Pierce, J. 2/28/77) indicates that "The only issue which need be addressed is whether the New York Board of Education can be held liable for damages in an action such as this one." (emphasis added)

2. The Defendant-Appellant Arricale's argument concerns itself with compensatory damages and conspiracy. The award was for actual damages - back pay - not compensatory damages or conspiracy with which the District Court's Memorandum and Order did not concern itself. (Appellee's Brief: Facts, P. 2, Paragraph 3)

3. The District Court's comprehensive statement concering the denial of due process on which the award of damages for back pay was based was cited under Facts. (Appellee's Brief: Paragraphs 3-5)

4. Appellee's Brief, Paragraphs 4, 6-9, Facts, cited the District Court's Opinion and Orders indicating that as plaintiff, pro se I be reinstated and given credit toward retirement and that the District Court retains jurisdiction under 28 U.S.C. §1331. The matter of Defendant Arricale's liability under § 1983 wasn't reargued in the District Court nor was the Partial Judgment of August 31, 1976 appealed.

5. The Order of Pierce, J. 1/31/77 (Appellants' Appendix: p. 101) and the Appellee's Brief, Facts, Paragraph 8 indicates that as plaintiff, pro se, I was reinstated October 1, 1976. However, I was subsequently dismissed October 26, 1977 and received notification of the dismissal the next day October 27. (Appellants' Brief: p. 3, *, refers to the dismissal)

6. The Partial Judgment (for reinstatement) and for credit toward retirement pending in the District Court against Defendant Arricale under § 1983 (not reargued or appealed) and the award for back pay against Defendant-Appellant Arricale are based on the same denial of due process and the same "common nucleus of operative fact." (Appellants' appendix: p 98, pp. 98-99)

Nelson -v- Litkins

D.C. Minn. 1974, 389 F. Supp. 1234
affirmed 510, F 2d 414

Johnson -v- Harder

D.C. Conn 1974, 383 F. Supp 174
affirmed 512 F 2d 1188, certiorari denied
96 S. Ct. 149

Point IV

In the matter of costs I believe the following should be considered:

1. Scheduling Order # 1 of April 13, 1977 ordered the Appellants' brief and joint appendix to be filed by June 10, 1977.

2. The Appellants made 3 (three) applications for an enlargement of time, unopposed, in which to file the Appendix and Brief. The requests were granted and page 41 of the Appellants' Brief appears to indicate that on July 20, 1977 the Appendix and the Brief were filed.

3. Appellants' Brief, page 41, indicates that Rebal Abidar, a third-year law student "substantially contributed to the preparation of this brief."

4. Only 34% of the Appellants' Brief, Point III, concerns itself with the issue the District Court indicated need be addressed - only the liability of the Board for back pay damages.

Conclusion

Because of ill health, I won't be able to appear for argument scheduled for the week of August 29, 1977. I request that argument be waived (or that I be excused if the request is denied) and that the Appeal be decided on the basis of the submitted Appendix and Briefs.

Although I'm unable to defend the District Court's finding of liability against the Defendant-Appellant Board, the appeal should be dismissed and an order entered directing the District Court to enter summary judgment only against Defendant-Appellant Arricale with interest at six per cent from October 1, 1976, with costs, and for further consideration.

Respectfully submitted,
Robert Glenn
Plaintiff-Appellee, Pro Se

Dated: New York, N.Y.
Sworn to August 15, 1977 before

SAM CORSKY
Notary Public, State of New York
No. 31-1517260
Qualified in New York County
Commission Expires March 30, 1978